

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS PAUL DIMITROFF,

Defendant-Appellant.

UNPUBLISHED

April 30, 1999

No. 210168

Livingston Circuit Court

LC No. 97009893

Before: Holbrook, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver psilocybin (illegal mushrooms), MCL 333.7401(2)(b); MSA 14.15(7401)(2)(b), and possession with intent to deliver marihuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The trial court sentenced defendant to twenty-four months' probation. Defendant appeals as of right and we affirm.

Police arrested defendant during a raid on a house in Hamburg Township. When found, defendant and another man were seated in a bedroom, facing each other, about two feet apart. Between them sat eight plastic bags filled with marihuana, four plastic bags filled with illegal mushrooms, a box of empty bags, and a scale. Just one day earlier police (through a confidential informant) had purchased drugs from someone in the house using marked bills. Police found the bills in the same room with defendant and the other man. Defendant rented the bedroom next door to the room in which police found him. No drugs were found in defendant's room or on his person.

On appeal, defendant first argues that the trial court erred in failing to instruct the jury on the issue of the specific intent required for possession with intent to deliver. We disagree. This Court reviews de novo a claim of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Instructions to the jury should be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

Possession with intent to deliver narcotics is a specific intent crime. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The prosecution is required to prove that the defendant possessed narcotics with the specific intent of distributing them. *Id.* Included among defense counsel's list of proposed jury instructions was CJI2d 3.9, the standard jury instruction on specific intent. Although the trial court did not give CJI2d 3.9, it addressed the requisite intent when it instructed the jury on the elements of possession with intent to deliver:

Now, the Defendant is charged with the crime of illegally possessing marihuana with the intent to deliver. To prove this charge the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant knowingly possessed a controlled substance, marihuana.

Second, either the defendant intended to deliver the substance to someone else or intended to aid and abet another in delivering this substance to someone else.

Third, that the substance possessed was marihuana and the Defendant knew it was.¹

This instruction clearly explained to the jury that defendant must have intended to deliver the substance. Moreover, given the circumstances of this case, there is no special reason to think that the jury may have had difficulty understanding the concept of "intent" as applied to the crimes charged. Cf. *People v Beaudin*, 417 Mich 570, 575-576; 339 NW2d 461 (1983). Accordingly, we hold that there was no error because the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Bell, supra* at 276.

Defendant next argues that defendant was denied his right to a unanimous jury verdict when the trial court instructed the jury that it could find defendant guilty as a principle *or* as an aider and abettor, provided a verdict form that did not list both "possession with intent to deliver" and "aiding and abetting possession with intent to deliver," and failed to instruct the jury that it was required to render a unanimous verdict. We disagree.

Under the Michigan Constitution, a criminal defendant is entitled to a unanimous jury verdict. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In order to protect this right, the trial court must instruct the jury regarding the unanimity requirement. *Cooks, supra* at 511. As an initial matter we note that, contrary to the allegation in defendant's statement of the issue, the trial court did specifically instruct the jury that its verdict had to be unanimous. It did not, however, instruct the jury that it had to unanimously agree on one particular theory of guilt. Defendant contends that such an instruction was necessary to prevent the jury from reaching an "unconstitutional compromise verdict." We are not persuaded by defendant's argument. Where there is sufficient evidence to find defendant guilty as either a principle or as an aider and abettor, jury unanimity is not required with respect to each particular theory. See *People v Smielewski*, ___ Mich App ___, ___

NW2d ____ (Docket No. 208416, issued 4/9/99), slip op at 6; see also *People v Gadomski*, 232 Mich App 24, 30-31; ____ NW2d ____ (1998).

Next, defendant argues that the evidence was insufficient to support the jury's verdict. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Here, defendant was caught sitting over drugs and packaging paraphernalia. Also in the room were marked bills that police had used in a controlled drug purchase. The specific intent to deliver is proved by the packaging paraphernalia and the manner in which the drugs were packaged. *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162; 326 NW2d 825 (1982) ("It has frequently been held in Michigan that one can infer the intent to deliver from the quantity of narcotics, the way they are packaged or the paraphernalia found with the narcotics"). Constructive possession is easily inferred by defendant's presence in the house and the room, and his physical positioning with respect to the contraband. Accordingly, we hold that there was sufficient evidence to convict defendant of possession with intent to deliver as a principal or as an aider and abettor.

Finally, defendant argues that he was denied the effective assistance of counsel when defense counsel failed to ensure that the jury was instructed on the concept of specific intent by objecting to the instructions given by the trial court. We disagree. To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694. As noted above, in our discussion of defendant's first issue on appeal, defendant was not prejudiced by the failure of the trial court to give a special instruction on specific intent. Therefore, we hold that defendant could not have been denied the effective assistance of counsel as a result of the trial court's failure to object. See *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (holding that failure to raise a meritless objection does not constitute ineffective assistance of counsel).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ William B. Murphy

/s/ Michael J. Talbot

¹ The trial court gave substantially the same instruction regarding the charge possession with intent to deliver the mushrooms.